

Lawrence J. Gornick (SBN 136290)  
Debra DeCarli (SBN 237642)  
**LEVIN SIMES KAISER & GORNICK LLP**  
44 Montgomery Street, 36<sup>th</sup> Floor  
San Francisco, CA 94104  
Telephone: (415) 646-7160  
Fax: (415) 981-1270  
[lgornick@lskg-law.com](mailto:lgornick@lskg-law.com)  
[ddecarli@lskg-law.com](mailto:ddecarli@lskg-law.com)

Bruce W. Blakely (SBN 106832)  
**FLAXMAN & BLAKELY, AN ASSOCIATION**  
591 Redwood Highway, Suite 2275  
Mill Valley, CA 94941  
Telephone: (415) 381-6650  
Fax: (415) 381-4301  
[bruce@brucewblakely.com](mailto:bruce@brucewblakely.com)

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

PETER JAY GERBER AND MIRIAM  
GOLDBERG,

Plaintiffs,

vs.

BAYER CORPORATION AND BAYER  
HEALTHCARE PHARMACEUTICALS,  
INC.; BMC DIAGNOSTICS, INC.;  
CALIFORNIA PACIFIC MEDICAL  
CENTER; GENERAL ELECTRIC  
COMPANY; GE HEALTHCARE, INC.; GE  
HEALTHCARE BIO-SCIENCES CORP.;  
McKESSON CORPORATION; MERRY X-  
RAY CHEMICAL CORP.; and DOES 1  
through 35

Defendants.

Case No: 3:07-cv-05918-JSW

**PLAINTIFFS' OBJECTIONS TO AND  
MOTION TO STRIKE DECLARATION OF  
CAROL SLEETH AND ATTACHED  
DOCUMENTS**

Date: January 11, 2008  
Time: 9:00 a.m.  
Courtroom: 2

**JURY TRIAL DEMANDED**

1 In support of their Opposition to Plaintiffs' Motion for Remand, Removing Defendants filed  
 2 the Declaration of Carol Sleeth. Docket # 40-6. In flagrant disregard of Plaintiffs' privacy rights and  
 3 Local rule 3-17(a), Defendants' Declaration included as exhibits Plaintiff Peter Gerber's medical  
 4 records. Defendants also attached as an exhibit a demurrer that was filed in state court and  
 5 subsequently removed from the state court docket by the removing party. Plaintiffs ask that this  
 6 Court strike the Declaration of Carol Sleeth and the exhibits attached thereto, remove the medical  
 7 records from the record, and strike all references to the offending Declaration from Defendants'  
 8 Opposition to Plaintiffs' Motion for Remand.

### 9 LEGAL ANALYSIS

#### 10 **A. Defendants Violated Mr. Gerber's Privacy Rights and Violated this Court's Rules by** 11 **Attaching Mr. Gerber's Medical Records to a Publicly-Filed Document.**

12 Defendants flagrantly disregarded Plaintiffs' privacy rights and this Court's Local Rules when  
 13 it attached pages from Mr. Gerber's medical records to the Declaration of Carol Sleeth.<sup>1</sup> The right of  
 14 privacy in one's medical records is a fundamental right. California Constitution, Article I, section 1;  
 15 *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681 (1965) (right to privacy is implied  
 16 in the 1st, 3rd, 4th, 5th, and 9th Amendments); *Heda v. Superior Court*, 225 Cal.App.3d 525, 527,  
 17 275 Cal.Rptr. 136, 137 (1st Dist. 1990) (recognizing that privacy rights of Article I, section I of the  
 18 California Constitution include the details of a patient's medical history). Individuals have a  
 19 reasonable expectation that their medical records will not become public documents. *Heda* at 527.  
 20 In addition to constitutional privacy rights, this Court prohibits parties from including private medical  
 21 information in documents filed with the Court. Local Rule 3-17(a).

22 Defendant California Pacific Medical Center ("CPMC"), a medical facility where Mr. Gerber  
 23 received medical treatment, had a duty to protect his privacy rights. *Cook v. Yellow Freight System,*  
 24 *Inc.*, 132 F.R.D. 548 (E.D. Cal. 1990) (Custodians of patients' medical records have a duty to protect

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 26  
 27 <sup>1</sup> The records are not even properly authenticated by the custodian of records.

1 the privacy rights of their patients). Instead of protecting Mr. Gerber's privacy rights, Defendant  
2 CPMC allowed Removing Defendants to misuse Mr. Gerber's records for their self-serving ends.  
3 Defendants' cavalier disregard for Plaintiff's privacy rights and this Court's Local Rules regarding  
4 use of medical records should not be condoned.

5 **B. The Demurrer Attached as an Exhibit to the Declaration Should be Disregarded.**

6 This Court assumed jurisdiction over this case on November 21, 2007. The state court where  
7 this case was commenced lost jurisdiction on the same date. The demurrer attached to Ms. Sleeth's  
8 Declaration was filed three weeks after the state court was divested of jurisdiction. CPMC  
9 subsequently removed the demurrer from San Francisco Superior Court's docket. The document is  
10 null and should be disregarded. If Defendants wanted to make the arguments made in the demurrer,  
11 they should have briefed them in their Opposition rather than incorporating the exhibit by reference  
12 into their Opposition. Attaching the demurrer rather than including the briefing within the body of  
13 their Opposition is an abuse of the page limitations imposed by this Court.

14 **CONCLUSION**

15 Removing Defendants' flagrant disregard for Plaintiffs' privacy rights and the Local Rules of  
16 this Court should not be condoned. Plaintiffs respectfully request that this Court strike the  
17 Declaration of Carol Sleeth and its attached exhibits and all references in the record to the declaration  
18 of any of its exhibits.

19  
20 Dated: December 26, 2007

LEVIN SIMES KAISER & GORNICK LLP

21  
22 By: s/ Lawrence J. Gornick  
23 Lawrence J. Gornick, Esq.

Lawrence J. Gornick (SBN 136290)  
Debra DeCarli (SBN 237642)  
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44 Montgomery Street, 36<sup>th</sup> Floor  
San Francisco, CA 94104  
Telephone: (415) 646-7160  
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[ddecarli@lskg-law.com](mailto:ddecarli@lskg-law.com)

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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

PETER JAY GERBER AND MIRIAM  
GOLDBERG,

) Case No.: 3:07-cv-05918-JSW

Plaintiffs,

## PROOF OF SERVICE

vs.

BAYER CORPORATION AND BAYER HEALTHCARE PHARMACEUTICALS, INC.; BMC DIAGNOSTICS, INC.; CALIFORNIA PACIFIC MEDICAL CENTER; GENERAL ELECTRIC COMPANY; GE HEALTHCARE, INC.; GE HEALTHCARE BIO-SCIENCES CORP.; McKESSON CORPORATION; MERRY X-RAY CHEMICAL CORP.; and DOES 1 through 35,

Defendants.

1 I certify that I am over the age of 18 years and not a party to the within action; that my business  
2 address is 44 Montgomery Street, 36<sup>th</sup> Floor, San Francisco, CA 94104; and that on this date I served a  
3 true copy of the document(s) entitled:

4 **PLAINTIFFS' OBJECTIONS TO AND MOTION TO STRIKE DECLARATION OF CAROL**  
5 **SLEETH AND ATTACHED DOCUMENTS**

6 Service was effectuated by forwarding the above-noted document in the following manner:

7 **By Regular Mail** in a sealed envelope, addressed as noted above, with postage fully prepaid  
8 and placing it for collection and mailing following the ordinary business practices of Levin  
9 Simes Kaiser & Gornick.

10 **By Hand Delivery** in a sealed envelope, addressed as noted above, through services provided  
11 by the office of Levin Simes Kaiser & Gornick.

12 **By Facsimile** to the numbers as noted below by placing it for facsimile transmittal following  
13 the ordinary business practices of Levin Simes Kaiser & Gornick.

14 **By Overnight Courier** in a sealed envelope, addressed as noted above, through services  
15 provided by (Federal Express, UPS,) and billed to Levin Simes Kaiser & Gornick.

16 ☒ **By Electronic Service** by transmission through ECF (Electronic Case File Internet Site).

17 I declare under penalty of perjury that the foregoing is true and correct.

18 Executed on December 28, 2007 at San Francisco, California.

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J.C. Luske